§362(a)
§362(d) - annulment of stay for collection of past due child support
Conflict of interest of Attorney

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of: ALFONSO GREEN JOAN GREEN (Chapter 13 Case 87-40327) Debtors ALFONSO GREEN Plaintiff v. JOAN GREEN, Co-Debtor M. E. GEARY, Individually and as Attorney of Record for Joan Green and Alfonso Green Defendants	Adversary Proceeding Number 89-4045

MEMORANDUM AND ORDER

This case comes before the Court upon Plaintiff's Motion to Declare Superior Court Order Void, for Contempt and for Damages. A hearing was held on June 23, 1989, and after hearing the evidence

adduced at trial and the brief submitted by the Plaintiff, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) The Debtors, husband and wife, filed a joint petition under Chapter 13 of the Bankruptcy Code on April 13, 1987. The Debtors' attorney of record for this bankruptcy petition is Defendant M. E. Geary. According to the testimony of Mr. Geary, co-defendant Mrs. Green first approached him to discuss her financial problems on February 9, 1987, at which time Geary advised that Mrs. Green file a joint petition with her husband under Chapter 13 of the Bankruptcy Code. Plaintiff, Mr. Green, was not present at that meeting. Said joint Chapter 13 petition, signed by both Debtors, was filed with this Court on April 3, 1987.

2) On May 5, 1987, Debtors contacted Geary to inquire about the possibility of an uncontested divorce. However, the parties could not agree regarding the matter of child support and it soon became apparent that the divorce would be contested. Notwithstanding the potential for conflict of interest, Geary

represented Mrs. Green in the divorce action against her husband and co-debtor, Geary's Chapter 13 client.[1]

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[1] Geary testified at the June 23rd hearing that he did not actually represent the Plaintiff in the bankruptcy proceeding, but rather, somehow handled the case for Mrs. Green, and merely added Mr. Green's name as an "administrative convenience". This Court will not accept that argument.

Bankruptcy Rule 9011 requires that all documents be signed by at least one attorney of record, unless a party is not represented by an attorney, and then they shall be filed by the party himself. The signature of the attorney " . . . constitutes a certificate that the attorney . . . has read the document; that to the best of the attorney's . . . knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . . ". Geary's signature on the joint petition constitutes his verification that he is in fact the attorney of record for both parties. An attorney may not sign any pleading or other document submitted to this Court without strict compliance with the mandate of Rule 9011. Thus, notwithstanding his assertion that Mr. Green was added merely as a matter of "convenience", Geary is charged with the representation of Mr. Green and all of the responsibilities required of attorneys in the State of Georgia towards his client. Because of Mr. Geary's representation of Mrs. Green in the domestic case, Mr. Green's present counsel have raised the issue of a potential conflict of interest on his part. Rule 4-102 of the Rules and Regulations for the Organization and Government of the State Bar of Georgia, Part IV, Chapter I, sets forth the Standards of Conduct to be observed by members of the State Bar of Georgia and those authorized to practice law in Georgia. These standards specifically address the problem of an attorney's potential conflict of interest. The relevant standards of conduct applicable in this case are: Standards 35, 36, 37, and 69.

In light of the fact that Geary has represented an interest adverse to that of a current client, his actions in both the Chapter 13 case and the domestic case have been seriously called into question. However, a determination as to whether he has adhered to those standards is not before me in this proceeding.

3) On July 15, 1987, a temporary order was entered on the divorce of the Chapter 13 co-debtors in the Superior Court of Chatham County. Said order provided for payments of child support at $720.00 per month and also provided that Mr. Green would make all payments under the Chapter 13 plan. On August 19, 1987, a final divorce decree was entered nunc pro tunc July 24, 1987. Mr. Green was unrepresented at all divorce proceedings in the Superior Court for Chatham County and did not appear at the final hearing. Defendant Geary, Mr. Green's attorney in the pending Chapter 13 bankruptcy proceeding, appeared in an adversary role on behalf of Mrs. Green in the divorce proceeding.

4) No relief from stay was sought or granted from this Court prior to the filing of his complaint for divorce which sought not only resolution of divorce and custody issues, but also the resolution of economic issues such as child support and property division. The August 19, 1987 nunc pro tunc order issues a judgment and decree granting a divorce to the parties, awarding to Mrs. Green sole ownership of the marital residence; custody of the three minor children of the parties; sole and permanent use and possession of the household furniture and furnishings presently located at the marital residence; and child support from Plaintiff of $720.00 per month ($240.00 each for three children). Mr. Green was required to

keep all bills currently listed under the Chapter 13 plan in a current status, or, in the alternative, to continue funding the Chapter 13 plan in the amount of $75.00 per week and was to be held responsible for all current and delinquent State and Federal income taxes resulting from the marriage. He was also required to pay $300.00 to the law firm of M. E. Geary, P. C.

5) On August 31, 1987, this Court confirmed the Debtors' Chapter 13 plan. It was approved as a composition plan, whereby unsecured creditors would receive a 29.4% dividend. Payments were to be made to the plan at the rate of $325.00 per month.

6) As a part of the schedules for the Chapter 13 bankruptcy, Debtors listed their expenses as $2,330.64, this being Mr. Green's understanding of the expenses of their five member household (both joint-Debtors as well as their three minor children). He believed these expenses to be an accurate reflection of the parties' financial condition, said financial condition to be such that the parties were only able to pay $325.00 per month into their Chapter 13 plan. Yet only two months later, Mrs. Green, by and through her attorney, Defendant Geary, filed a petition for divorce which contained a financial statement listing the expenses

of the now four-member household (herself and the three minor children) to be over $200.00 more, i.e. $2,577.00. Mrs. Green further listed an additional $200.00 as part-time income.

7) Unable or unwilling to meet his obligations both to this Court and under the divorce decree, Mr. Green has fallen behind in his child support payments. In response thereto, Mrs. Green, by and through her attorney, Defendant Geary, filed two garnishments against the Plaintiff. Although no monies were garnished pursuant to the first action, Mr. Green had $296.00 deduced from his salary pursuant to the second garnishment action. He has also been subject to a contempt action in the Superior Court of Chatham County for his failure to pay monthly child support payments. He has received letters written on Mrs. Green's behalf from his attorney Geary, outlining payment schedules, notifying him of garnishment proceedings, and threatening proceedings for contempt and imprisonment.

8) On May 12, 1989, Mr. Green filed this adversary proceeding. In response thereto Mrs. Green sought independent counsel and on June 15, 1989, counterclaimed for a child support arrearage of $12,000.00 and crossclaimed against Defendant Geary. Mr. Geary has appeared pro se in this action.

CONCLUSIONS OF LAW

Mr. Green asserts that the actions of Mrs. Green and her attorney, Defendant Geary, in filing and pursuing economic sanctions in the domestic case constitute a violation of the automatic stay provisions of 11 U.S.C. Section 362(a). Plaintiff seeks to void the decree, as well as general damages, including but not limited to the return of all monies withheld from his salary by virtue of the Superior Court judgment, as all monies paid to Defendant Geary, all other attorney's fees and costs, and punitive damages pursuant to 11 U.S.C. Section 362(h). The determinative issue in this case is the effect of the Section 362 automatic stay in the domestic relations context.

11 U.S.C. Section 362(a) automatically stays the commencement or continuation of judicial proceedings against the debtor that were or could have been commenced before the bankruptcy petition was filed. Section 362 is one of the fundamental protections for debtors under the Bankruptcy Code. It is designed to give the debtor a breathing spell from creditors, to stop all collection efforts, all harassment, and all foreclosure actions.

H. R. Rep. No. 95-595, 95th Cong., 1st Sess. 174 (1977), 1978 U. S. Code Cong. & Admin. News, 5787, 6296. The automatic stay provision functions to facilitate the orderly administration of the debtor's estate. Donovan v. T.M.C. Industries, Ltd., 20 B. R. 997 (N. D. Ga. 1982). The stay operates to bring the property of the debtor into the custody of the "bankruptcy court by the filing of a petition, and no interference with that custody can be countenanced without the court's permission." In re Adana Mortgage Bankers, Inc., 12 B. R. 989 (Bankr. N. D. Ga. 1980), vacated by joint motion, 687 F.2d 344 (11th Cir. 1982). Without such a provision the orderly liquidation or rehabilitation of the debtor would be impossible. H. R. Rep. 95-595 at 174, S. Rep. No. 95-989, 95th Cong., 2nd Sess. 49 (1978). In relevant part, Section 362 provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this . . . operated as a stay, applicable to all entities of--
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> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> (3) any act to obtain possession of property of the estate or of property from the

> estate or to exercise control over property of the estate;
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> (4) any act to create, perfect, or enforce any lien against property of the estate;
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> (b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay--
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> (2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate.

Congress clearly intended the automatic stay to be quite broad. Exemptions to the stay, on the other hand, should be read narrowly to secure the broad grant of relief to the debtor. Matter of Elrod, 91 B. R. 187 (Bankr. M. D. Ga. 1988). Since the Debtors filed for Chapter 13 protection, Section 1306 of the Bankruptcy Code is the governing section for determination of what constitutes property of the debtor's estate. In re Denn, 37 B. R. 33 (Bankr. D. Minn. 1983). Subsection (a)(2) of Section 1306 provides:

> (a) Property of the estate includes, in addition to the property specified in section 541 of this title--
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> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

Thus, Plaintiff's post-petition earnings constitute part of the Debtor's Chapter 13 estate and are protected by the automatic stay provisions of Section 362(a) of the Code. The Section 362(b)(2) exemption from the automatic stay for the "collection" of child support applies only to proceedings to collect child support that has been awarded by a court order entered prior to the filing of the petition in bankruptcy. In re Stringer, 847 F.2d 549 (9th Cir. 1988). Since the Defendants' actions at issue did not involve the "collection" of child support that had been awarded by a pre-petition court order, the exemption of Section 362(b)(2) does not apply.

Defendants have argued that this is not a situation that would have been stayed under 11 U.S.C. Section 362(a), and thus it does not matter if it did not fall within the exception of 11 U.S.C. Section 362(b). This argument is erroneous. Section 362(a)(1) clearly states that the filing of a Chapter 13 petition operates as a stay applicable to all entities of "the commencement . . . of a judicial . . . proceeding against the debtor that was or could have been commenced before the commencement of the case under this title." An obligation to support a minor child arises at the birth of a child. It does not arise at the filing of a domestic case.

The filing of the Chapter 13 petition also operates as a stay applicable to all entities of "any act to obtain possession of property of the estate or of property from the estate" and "any act to create, perfect, or enforce any lien against property of the estate." This was clearly an action on behalf of "an entity" (one co-debtor) to "obtain possession of property of the estate" or to "create a lien" against property of the estate. There would be no reason for Congress to have included the 362(b)(2) exception for past due support (where awarded prior to the filing of the bankruptcy petition) if this were not a situation that was initially meant to be included in the automatic stay provisions of Section 362(a).

Defendants have argued that somehow it does not matter what one joint debtor does to another joint debtor, because it is all the same estate in the Chapter 13 context. Defendants apparently reason that nothing is being depleted from the estate, since it is simply being moved from one joint owner of the bankruptcy estate to the other joint owner. This argument ignores the objective of child support payments. The custodial parent acquires no interest in funds paid as child support and is charged with the duty of seeing that they are applied solely for the benefit

of the children. Farmer v. Farmer, 147 Ga. App. 387, 249 S. E. 2d 106 (Ga. App. 1978). Where an award is made to the custodial parent for the maintenance and support of minor children of the parties, such payments should be used solely for the benefit of the child, and in the receipt and use of such money, the custodial spouse acts as a trustee or guardian of the minor child. Thomas v. Holt, 209 Ga. 133, 70 S. E. 2d 595 (1952); The children of the divorced parties, beneficiaries of the child support payments, are not before this Court as co-debtors and therefore Defendants' argument that the payments are merely being shifted from one co-debtor to the other co-debtor is without merit.

This Court finds that the Defendants have violated the automatic stay provisions of Section 362(a)(3). Any proceedings in violation of the automatic stay in bankruptcy are generally void. Kalk v. Feuerstein, 308 U.S. 433, 438-439, 60 S.Ct. 343, 345-346, 84 L.Ed. 370 (1940). See also, Collier on Bankruptcy, §362.03, 362-31 (15th Ed. 1989). This is not to say that the dissolution of marriage itself is affected. The Bankruptcy Code protects property of the bankruptcy estate and of the debtor; it does not protect the marital status of the debtor. Matter of Elrod, supra at 189; In re Stringer, supra at 553. Once a bankruptcy is filed, a superior court judgment does not affect the character or title of the

property held in the debtor's estate. 28 U.S.C. Section 1471(e) provides that the bankruptcy court shall have exclusive jurisdiction of all property, wherever located of the debtor, as of the commencement of the case. Unless and until the bankruptcy court defers such jurisdiction to another court, the property of the estate will be unaffected by the superior court decree. In re Willard, 15 B. R. 898 (Bankr. 9th Cir. 1981). Accordingly, I conclude that the superior court decree, insofar as it deals with issues of alimony, support or division of property is void. As to termination of the marriage of these parties however, the decree is not in violation of the stay and remains in full force and effect.

This Court is by no means unsympathetic to the claims and needs of Defendant Green. Collection of past-due child support payments is a nationwide problem. While it is true that all acts taken in violation of the automatic stay are generally deemed void and without effect, Kalk v. Feuerstein, supra at 443, 60 S.Ct. at 348; Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308 (11th Cir. 1982), Section 362(d) expressly grants bankruptcy courts the option, in fashioning appropriate relief of, "annulling" the automatic stay (in addition to terminating it). The word "annulling" in this provision evidently contemplates the power of bankruptcy courts to grant relief from the stay which has

retroactive effect; otherwise its inclusion next to "terminating", would be superfluous. Collier on Bankruptcy, §362.07 at 362-54 (15th Ed. 1989) states:

> The flexibility of Section 362 is underscored by the language of subsection (d) which provides that relief may be granted by "terminating, annulling, modifying, or conditioning" the stay. The effect is to permit the court to fashion the relief to the particular circumstances of the case. Thus, modification of the stay may be sufficient to protect the non-debtor party by permitting the exercise of certain but not all of its rights. The use of the word "annulling" permits the order to operate retroactively, thus validating actions taken by a party at a time when he was unaware of the stay.

The advisory committee note to former Bankruptcy Rule 601(c), a predecessor to Section 362(d), explains the role of annulment as follows:

> This rule consists with the view that . . . an act or proceeding [against property in the bankruptcy court's custody taken in violation of the automatic stay] is void, but subdivision (c) recognizes that in appropriate cases the court may annul the stay so as to invalidate action taken during the pendency of the stay.

Thus, "Section 362(d) permits bankruptcy courts, in appropriately limited circumstances, to grant retroactive relief from the automatic stay." In re Albany Partners, Ltd., 749 F.2d 670, 675 (11th Cir. 1984). While acknowledging that the important Congressional policy behind the automatic stay demands that courts be especially hesitant to validate acts committed during the pendency of the stay, this court is deeply concerned with the Defendant's need for child support payments. In balancing the equities before this Court, I find that the Defendant Joan Green is entitled to retain all support payments as ordered by the Superior Court of Chatham County which have heretofore been paid by or received from Mr. Green and I therefore annul the stay for that limited purpose. Further, this Court hereby grants relief from the automatic stay for the purpose of relitigation of child support, alimony and property division issues in the Chatham County Superior Court. Mrs. Green is free to seek recovery of any sum which the Superior Court may award for child support, alimony or division of property and free to seek an award which will compensate for the entire period since the parties were separated.

As a practicing bankruptcy attorney familiar with the application and broad scope of the automatic stay, Mr. Geary knew or should have known that his actions would improperly interfere

with the orderly collection and distribution of the Debtor's assets. When a party acts in knowing violation of the stay it takes the risk that its actions will be found wrongful. In re Amintern, Inc., 46 B. R. 566 (Bankr. N. D. Tenn. 1985). There need not be a subjective conscious intent to do harm for an act to constitute a willful violation of the stay. Instead, all that is required is that a party violated the stay with actual knowledge or reason to know that a case had been filed. In re Bragg, 56 B. R. 46 (Bankr. M. D. Ala. 1985). I therefore find that Defendant Geary in pursuing the alimony, support or property division issues willfully violated the Section 362 stay. Mrs. Green stated at paragraph 23 of her Answer and Crossclaim that: "At all times relevant to this adversary proceeding, she was represented by, and entirely dependent upon, M. E. Geary." In open Court, Mr. Geary, to his credit, took full responsibility for any actions taken by Mrs. Green on his advice. This Court finds that Mrs. Green's reliance upon her attorney was reasonable. Therefore, I do not find that she is liable in damages for violation of the automatic stay. However, as to Mr. Geary, it is appropriate to award costs and attorney's fees where an equity has knowingly taken action in violation of the stay. Section 362(h) mandates that:

> An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including

costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

At this point it is speculative at best to assess the damages, if any, which Mr. or Mrs. Green have suffered. Indeed, relitigation of certain issues in Superior Court may restructure the parties' financial obligations. Such a restructuring may or may not give rise to damages but those will be easier to assess after the fact. I therefore conclude that a continued hearing to determine damages will be scheduled after conclusion of the domestic case, and only upon notification by the parties that the case is ripe for consideration.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Defendant Joan Green is entitled to retain all support payments as ordered by the Superior Court of Chatham County which have heretofore been paid by or received from Plaintiff Alfonso Green.

ORDERED FURTHER that relief from the automatic stay is granted for the purpose of relitigation of child support, alimony, and property division issues in the Chatham County Superior Court. Defendant Joan Green is free to pursue collection of any sums allowed by the Superior Court.

ORDERED FURTHER that Defendant M. E. Geary is in willful violation of the Section 362 stay. A continued hearing to determine damages will be scheduled after conclusion of the domestic case.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia,
This 8th day of September, 1989.